No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE MUNICIPAL LIGHT COMPANIES OR DEPARTMENTS OF ASHBURNHAM, BOYLSTON, HUDSON, PAXTON, PEABODY, SHREWSBURY, TEMPLETON, WAKEFIELD and WEST BOYLSTON, MASSACHUSETTS, individually and on behalf of their ratepayers, and THE TOWNS OR CITIES OF ASHBURNHAM, BOYLSTON, HUDSON, PAXTON, PEABODY, SHREWSBURY, TEMPLETON, WAKEFIELD, and WEST BOYLSTON, MASSACHUSETTS,

Petitioners,

V.

THE COMMONWEALTH OF MASSACHUSETTS, ROBERT BOULAY, Director of the Massachusetts Civil Defense Agency, Officially; MICHAEL J. DUKAKIS, Governor of the Commonwealth of Massachusetts; AND JAMES SHANNON, Attorney General of the Commonwealth of Massachusetts,

Respondents,

AND

THE TAUNTON MUNICIPAL LIGHTING PLANT, UNITED ILLUMINATING COMPANY, VERMONT ELECTRIC COOPERATIVE, and the MUNICIPAL LIGHT COMPANIES OR DEPARTMENTS OF BRAINTREE, DANVERS, GEORGETOWN, GROTON, HINGHAM, HOLDEN, HOLYOKE, IPSWICH, LITTLETON, MANSFIELD, MARBLEHEAD, MIDDLEBOROUGH, MIDDLETON, NORTH ATTLEBORO, READING, SOUTH HADLEY, STERLING, WESTFIELD and the MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Necessary Parties.

Petition For Writ Of Certiorari
To The Appeals Court
For The Commonwealth Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

IS A TEMPORARY TAKING OF PROPERTY RESULTING FROM A STATE'S DELIBERATE OBSTRUCTION OF A FEDERAL LICENSING PROCEDURE COMPENSABLE AS A REGULATORY TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the names of all parties to the proceedings below appear in the caption of this case. There are no known parent companies nor non-wholly-owned subsidiaries.

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No. _____

IN THE

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OCTOBER TERM, 1993

THE MUNICIPAL LIGHT COMPANIES OR DEPARTMENTS OF ASHBURNHAM, BOYLSTON, HUDSON, PAXTON, PEABODY, SHREWSBURY, TEMPLETON, WAKEFIELD and WEST BOYLSTON, MASSACHUSETTS, individually and on behalf of their ratepayers, and THE TOWNS OR CITIES OF ASHBURNHAM, BOYLSTON, HUDSON, PAXTON, PEABODY, SHREWSBURY, TEMPLETON, WAKEFIELD, and WEST BOYLSTON, MASSACHUSETTS,

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PETITION FOR WRIT OF CERTIORARI

PETITIONERS, THE MUNICIPAL LIGHT COMPANIES OR DEPARTMENTS OF ASHBURNHAM, BOYLSTON, HUDSON, PAXTON, PEABODY, SHREWSBURY, TEMPLETON,

WAKEFIELD and WEST BOYLSTON, MASSACHUSETTS, individually and on behalf of their ratepayers, and THE TOWNS OR CITIES OF ASHBURNHAM, BOYLSTON, HUDSON, PAXTON, PEABODY, SHREWSBURY, TEMPLETON, WAKEFIELD and WEST BOYLSTON, MASSACHUSETTS, respectfully pray that a writ of certiorari issue to review the Rescript and Opinion of the Appeals Court for the Commonwealth of Massachusetts, affirming the summary dismissal of Petitioners' First Amended Complaint, holding that a temporary taking of property and impairment of contracts, resulting from a state's deliberate obstruction of federal licensing procedures, is not compensable under the United States Constitution.

OPINIONS BELOW

The unpublished Rescript and Opinion of the Appeals Court of the Commonwealth of Massachusetts appears in Appendix A to this Petition. The unpublished Memorandum of Decision and Order for Judgment of the Suffolk Superior Court for the Commonwealth of Massachusetts appears in Appendix B to this Petition. The unpublished Notice of Denial of F.A.R. Application issued by the Full Supreme Judicial Court of the Commonwealth of Massachusetts appears in Appendix C to this Petition.

JURISDICTION

The Massachusetts Appeals Court entered its opinion in this matter on February 25, 1993. A timely Application for Leave to Obtain Further Appellate Review ("F.A.R.") By the Full Supreme Judicial Court of the Commonwealth of Massachusetts was filed on March 15, 1993. The Full Supreme Judicial Court issued its Notice of Denial of F.A.R. Application on April 27, 1993. This Court's jurisdiction is invoked under Title 28, U.S.C. §1257(a) (1966) which states, in pertinent part, that:

> Final judgments or decrees entered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution are set forth in Appendix D.

Article I, Section 10, clause 1 to the United States Constitution is set forth in Appendix E.

STATEMENT OF THE CASE

Petitioners are various cities, towns and municipal light departments, suing individually and on behalf of their ratepayers to recover over $1,000,000,000.00 in losses resulting from Respondents' temporary taking of Petitioners' property and unlawful impairment of their contracts. This taking was effected by Respondents' deliberate abuse of the state's police power, and deliberate obstruction of the federal licensing procedures for the Seabrook Nuclear Power Plant Unit 1 ("Seabrook"), which abuse and obstruction also unlawfully impaired certain of Petitioners' contracts.

The Suffolk Superior Court for the Commonwealth of Massachusetts had jurisdiction pursuant to Mass. Ann. Laws, Ch. 212, §3 (Law Co-op. 1979 and Suppl. 1988).

Petitioners filed their original Complaint and Jury Demand on or about December 9, 1988, followed by an Amended Complaint and Jury Demand on or about July 5, 1989. Respondents never filed an Answer to either the Complaint or the Amended Complaint. Moreover, insulated by a Protective Order, Respondents never answered nor otherwise responded to outstanding discovery requests.

Rather, on November 7, 1989, Respondents filed a Motion to Dismiss Amended Complaint; on January 4, 1990, Petitioners filed their Memorandum in Opposition to Respondents' Motion to Dismiss Amended Complaint; and on January 19, 1990, Respondents filed their Reply Memorandum. On July 18, 1990, Petitioners voluntarily dismissed Counts I and II of the Amended Complaint, which had sought mandamus and declaratory relief and were rendered moot by the licensing of Seabrook in mid-1990. Thereafter, on August 6, 1990, a hearing was held on Respondents' Motion to Dismiss the remaining counts of the Amended Complaint, including the federal "Takings Claims" and "Impairment of Contract Claims" at issue here. Petitioners filed a Supplemental Brief in Opposition to Motion to Dismiss on August 30, 1990.

In a Memorandum of Decision and Order for Judgment dated December 28, 1990, and entered January 23, 1991, Justice Patrick J.

King granted Respondents' Motion to Dismiss, under Mass. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief could be granted. Judgment was entered on that same date.

The state trial court never reached nor addressed the merits of Petitioners' federal "Takings" and "Contract Clause" claims, erroneously finding instead — on the basis of Massachusetts case law — that the Commonwealth was immune from liability. The state trial court ignored federal Constitutional law prohibiting the taking of property and the impairment of contracts held by a municipality in a proprietary capacity without payment of just compensation/money damages.[1]

On February 21, 1991, Petitioners timely filed their Joint Notice of Appeal in the Massachusetts Appeals Court, followed by the filing of their Statement of Proceedings on or about March 22, 1991. Petitioners' Brief on Appeal, along with Appendix, was then filed on or about September 7, 1991, followed by the filing of Respondents' Brief on or about October 31, 1991. Petitioners' Reply Brief was then filed on or about December 11, 1991.

Petitioners argued before the Massachusetts Appeals Court that their claims under the Takings Clause and the Contract Clause of the United States Constitution had been dismissed erroneously by the state trial court on grounds of immunity. Petitioners argued that the Appeals Court's holding violated controlling federal precedent prohibiting the taking and impairment, respectively, of municipal property and contracts, held in a proprietary capacity, without payment of just compensation/money damages.[2]

On or about August 21, 1992, Petitioners filed a letter with the Clerk of the Appeals Court, pursuant to Rule 16(1) of the Massachusetts Rules of Appellate Procedure, directing that Court's attention to this Court's recent decision in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (holding that any regulation which deprives a property owner — whether temporarily or permanently — of all "economically viable use" of his/her property affects a "taking" under the Fifth and Fourteenth Amendments to the United

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[1]The trial court also fundamentally erred in dismissing Petitioners' state constitutional and common law implied contract/estoppel claims.

[2]Petitioners also argued before the Appeals Court that their state constitutional and common law implied contract/estoppel claims had been dismissed erroneously.

States Constitution even where the regulation may have been a lawful exercise of the state's police power).

On November 12, 1992, oral argument was heard in the Appeals Court before a panel comprised of Justices Brown, Kass and Ireland. That panel issued its Opinion on February 25, 1993, affirming the Suffolk Superior Court's judgment of dismissal. The Appeals Court declined to rule on whether the distinction between "proprietary functions" and "governmental functions" applies in the context of takings of property by superior governmental agencies, erroneously holding instead that no temporary regulatory taking had occurred. (*See* Appendix A-8). Likewise, the Appeals Court declined to rule on whether the distinction between "proprietary functions" and "governmental functions" applies in the context of impairments of contracts by superior governmental agencies, erroneously finding, in total disregard of Petitioners' binding factual allegations to the contrary, an absence of legislative conduct to support such claims. (*See* Appendix A-10).[3]

On March 15, 1993, Petitioners timely filed their Application For Further Appellate Review ("F.A.R.") By the Full Supreme Judicial Court of the Commonwealth of Massachusetts. Petitioners argued before the Full Supreme Judicial Court that the Appeals Court's determination that ". . . there has been no taking" constitutes reversible error and contravenes the direct and binding holdings of this Court in *First English Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992) (each holding that temporary regulatory takings are compensable). Petitioners further argued to the Full Supreme Judicial Court that the Appeals Court had erroneously dismissed their federal Contract Clause claims on the basis of the impermissible factual finding that Petitioners "... do not point to any act of the Legislature which impeded their contract." (*See* Appendix A-10).[4] The Full Supreme Judicial Court

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[3]To the contrary, Petitioners identified six specific acts of legislative conduct to support their federal Constitutional claims. Moreover, Petitioners further argued that the full extent of Respondents' legislative entanglement had not yet been disclosed because Petitioners were not permitted to conduct any discovery and were enjoined from obtaining information under the Public Records Act. (*See* Appendix F).

[4]To the contrary, *see* n.3, *supra*. Petitioners also argued to the Full Supreme Judicial Court that the Appeals Court fundamentally erred in dismissing their state constitutional and common law implied contract/estoppel claims.

issued its Notice of Denial of F.A.R. Application on April 27, 1993.

The substantive errors below are exacerbated by the fact that, throughout the lower court proceedings, Petitioners were not only denied the opportunity to conduct any discovery, but were affirmatively enjoined from obtaining information otherwise available to every citizen under the Public Records Act. On January 13, 1989, shortly after filing their original Complaint, Petitioners filed their First Request for Production of Documents Directed to James M. Shannon, Attorney General of the Commonwealth of Massachusetts and Individually; their First Request for Production of Documents Directed to Robert J. Boulay, Director of the Massachusetts Civil Defense Agency and Individually; and their First Request for Production of Documents Directed to the Commonwealth of Massachusetts. On January 27, 1989, Respondents filed a Motion for Protective Order in which they requested entry of an order staying responses to discovery *and related public records requests* pending resolution of "questions of official immunity" which Respondents planned to argue in their anticipated Motion to Dismiss. On February 7, 1989, Petitioners filed their Opposition to Respondents' Motion for Protective Order. On February 13, 1989, a Protective Order was entered over Petitioners' objections

The lower court granted Respondents' Motion to Dismiss having wholly precluded Petitioners from obtaining evidence to support their claims, either through discovery or under the Public Records Act.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons:

(1) This Petition presents an important question of federal Constitutional law either not previously resolved by the Supreme Court or resolved by implication but not specifically and unequivocally decided by this Court;

(2) The Opinion below has decided an important federal Constitutional question in a way that conflicts with previous decisions of this Court and with the decisions of other federal and state courts; and,

(3) If the Opinion of the Massachusetts Appeals Court stands, Petitioners will have been denied every avenue of redress for the substantial federal Constitutional harms they have suffered.

A. Background

This case involves claims for just compensation and money damages under the "Takings Clause" and the "Contract Clause" of the United States Constitution.[5] Petitioners are various cities, towns and municipal light departments, suing individually and on behalf of their ratepayers, who spent or committed to spend over $1,000,000,000.00 on the Seabrook nuclear project ("Seabrook") in reliance upon authorizations and inducements made by the Commonwealth of Massachusetts and its agents ("Respondents").[6]

Respondents did much more than merely induce Petitioners' expenditures in Seabrook. Respondents created the "investment-backed expectation" itself; i.e., the mechanism for such investments and the statutory authorizations and administrative approvals without which Petitioners would not, and indeed could not, have invested in Seabrook.

Thereafter, Respondents withdrew their prior authorizations and approvals of Seabrook, worked to erect what Respondent Shannon, then-Attorney General of the Commonwealth of Massachusetts, termed "insuperable obstacles" to licensure and operation of Seabrook, and refused to publish the Commonwealth's Seabrook Radiological Response Plan.[7]

As a result of Respondents' conduct here, licensing and operation of the Seabrook facility was unduly delayed for almost four (4)

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[5]The Takings Clause, U.S. Const. Amend. V, provides in pertinent part that "... nor shall private property be taken for public use, without just compensation," and applies to the States through the Fourteenth Amendment. *Chicago Burlington and Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1987). (*See* Appendix D).

The Contract Clause, Art. I, Sec. 10, cl. 1, provides in pertinent part that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts ...". (*See* Appendix E).

[6] For purposes of reviewing the dismissal of Petitioners' Amended Complaint under Mass. R. Civ. P. 12(b)(6), all of Petitioners' factual allegations must be accepted as true and all inferences must be drawn in their favor. *Nader v. Citron*, 360 N.E. 2d 870 (1977).

[7]In September 1987, Respondent Shannon, as recently-appointed Massachusetts Attorney General, stated that the refusal by Respondent Dukakis to submit a radiological response plan for Seabrook presented an "insuperable obstacle to licensure".

years. Although the Seabrook plant was completed and stood ready for commercial operation on October 8, 1986, the Commonwealth's withdrawal of its prior approvals, its deliberate obstruction of federally preempted licensing procedures, its refusal to abide by principles of federal *res judicata*,[8] and its refusal to publish a radiological response plan, delayed issuance of an operating license until mid-1990.

With *each month* of delay, Petitioners and other investors in Seabrook incurred approximately $50,000,000.00 in carrying and operating charges. Additional damages also resulted from the loss of electricity and the cost of substitute power.

B. Discussion

This Court has expressly held that a state's regulatory conduct can give rise to a compensable taking under the Fifth and Fourteenth Amendments to the United States Constitution where it temporarily deprives property owners of all "economically viable use" of their

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In a letter dated February 3, 1988, Respondent Shannon wrote to Petitioners that, in his judgment and that of Respondent Dukakis, nuclear power is "unsafe under any circumstances". Respondent Shannon boasted that, because of his Department's ongoing efforts in actively opposing the Seabrook plant, it "will not ever operate". Respondent Shannon demanded that Petitioners terminate the "endless licensing proceedings before the NRC and default on their legal obligations to the project". Respondent Shannon concluded his letter by stating, "These developments highlight what Governor Dukakis and I have been saying for months: *The plant will never operate.*" (emphasis added).

Thereafter, Respondents' refusal to publish the Commonwealth's emergency response plan was described by the Atomic Safety and Licensing Board ("ASLB") as designed "to further a litigation strategy intended to defeat the application for an operating license". Partial Initial Decision - Seabrook Plan For Massachusetts Communities and 1988 FEMA Graded Exercise (ASLB November 9, 1989).

[8]Respondents participated as an interested state in the public hearings which were held in 1975 and 1976 regarding the selection of the Seabrook site. Respondents also participated in several subsequent administrative hearings and in an appeal to the United States Court of Appeals for the First Circuit. That appeal resulted on August 22, 1978, in an Opinion affirming the decision of the relevant federal regulatory bodies determining that Seabrook was a suitable site for the nuclear power facility. *See New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87 (lst Cir. 1978). No appeal was taken by Respondents from th. First

property. *See Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987).[9]

While all of the "regulatory takings" cases addressed to date by this Court have analyzed the effect of land-use statutes, regulations or ordinances, this Court has intimated that other state conduct may give rise to compensable takings.[10] This Court acknowledges "quite simply, [that it] has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government..." *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978), quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). However, in the context of "physical appropriations" cases, it is now well settled that state conduct which is functionally equivalent to a physical appropriation of property may be found to constitute a

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Circuit's decision. That decision thus became res judicata as to safety concerns regarding the Seabrook site, and Respondents were barred by principles of federal res judicata from incessantly relitigating that siting issue. That is, of course, exactly what Respondents had been relitigating in their efforts to cause Seabrook to not be licensed nor operated.

[9]*See also Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn. Inc.*, 452 U.S. 264, 295-96 (1981); and *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (each holding that a ". . . land use regulation can effect a taking if it 'does not substantially advance state interests . . . or denies an owner economically viable use of his land.' ").

[10]*See First English*, 482 U.S. at 318, citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating, "[i]t is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 415 (1922) (where Justice Holmes aptly stated that governmental power must have its limits or "the contract and due process clauses are gone" and "private property disappears"); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, (1978), cited in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (where this Court spoke of "economic injuries caused by public action"); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 653-54 (1981) (J. Brennan, dissent) (stating that the plain language of the just compensation clause requires its application to *any governmental action* that causes a sufficient devaluation of property). It should in any event be noted here that Petitioners expressly alleged substantial legislative conduct by Respondents. *See* n.3, *supra*.

compensable taking.[11] So too, state conduct which is functionally equivalent to a land-use regulation should give rise to a compensable regulatory taking where, as here, it "goes too far."[12]

Indeed, the entire doctrine of inverse condemnation is predicated on this proposition.

> It would be a very curious and unsatisfactory result if . . . it shall be held that if government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not "taken" for the public use.

Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-178 (1872), quoted in *First English*, 482 U.S. at 316.

Here, the Massachusetts Appeals Court held that no compensable "taking" had occurred for two (2) reasons:

> [1] The plaintiffs have not been totally deprived of the value of their property (citation omitted); and, [2] the Commonwealth has not regulated and cannot regulate Seabrook. Its activities have been confined to the role of an advocate before those federal agencies which can and do regulate Seabrook.

See Appendix A-9.[13] The first of these conclusions — that Peti-

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[11]*See Armstrong v. United States*, 364 U.S. 40, 48-49 (1960) (Government's complete destruction of a materialman's lien in certain property held a "taking"); *United States v. Causby*, 328 U.S. 256, 262-63 (1946) (Government's overflights above claimant's land, destroying present use of chicken farm, is a "taking"); *Griggs v. Allegheny*, 369 U.S. 84 (1962) (overflights held a taking); *Portsmouth Co. v. United States*, 260 U.S. 327 (1922) (United States military installations' repeated firing of guns over claimant's land is a taking); *United States v Cress*, 243 U.S. 316 (1917) (repeated floodings of land caused by water project is taking).

[12]*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[13]The Appeals Court expressly declined to consider whether municipal property held in a proprietary capacity may be taken without payment of just compensation. (*See* Appendix A-8). Nonetheless, this Court has suggested that such municipal property may not be taken without payment of just compensation. *See Gomillion v.*

tioners had not been totally deprived of the value of their property — conflicts with this Court's holdings in *First English* and *Lucas, supra*, in that the Appeals Court erroneously concluded:

> . . . that the interest of the plaintiffs in Seabrook retains value because the generating plant is operating. *Obtaining that value has perhaps taken longer and cost more because of the Commonwealth's activity, but that is analogous to inconvenience.*

See Appendix A-9 (emphasis added). To the contrary, Petitioners were *temporarily* deprived of all economically viable use of their property for the protracted period of time that the Commonwealth exercised its police power to circumvent the federal licensing process.[14]

Thus, pursuant to this Court's holdings in *First English* and *Lucas*, just compensation must be paid for that period of total deprivation in the event this Court determines that Respondents' conduct here constitutes "regulatory conduct" within the purview of those decisions.[15]

Lightfoot, 364 U.S. 339, 344 (1960), citing *Hunter v. Pittsburgh*, 207 U.S. 161, 178-181 (1907). Likewise, municipal contracts involving proprietary functions may not be impaired. *See Hunter, supra*; and *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 418 (1819). See also *City of Cambridge v. Comm'rs of Public Welfare*, 257 N.E. 2d 782, 785 (1970); *Mount Hope Cemetery v. Boston*, 33 N.E. 695 (1893). Moreover, and in any event, Petitioners brought suit here individually and on behalf of their ratepayers.

[14]Moreover, and in any event, whether Respondents' conduct constituted a taking requiring just compensation presents complex questions of material fact rendering summary disposition, in the absence of discovery, clear and reversible error. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), quoted in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 349 (1986), (holding that whether a taking has occurred requires "essentially ad hoc, factual inquiries . . ."). *See also Yankee Atomic Elec. Co. v. Secretary of Commonwealth*, 526 N.E. 2d 1246, 1250 (1988) (holding that whether a compensable taking has occurred requires a "lengthy factual determination").

[15]This Court expressly limited its holding in *First English* ". . . to the facts presented . . ." and did not deal with what were termed ". . . the quite different questions that would arise in the case of *normal delays* in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us". (emphasis added). 482 U.S. at 321.

This brings us to the second basis for the Appeals Court's decision — that:

> the Commonwealth has not regulated and cannot regulate Seabrook. Its activities have been confined to the role of an advocate before those federal agencies which can and do regulate Seabrook. (Appendix A-9).

The Appeals Court is correct *only* insofar as it implicitly acknowledges that the licensing of nuclear power facilities has been federally preempted, including "preemption" by Order of the First Circuit,[16] and vested solely with expert federal agencies, first the Atomic Energy Commission and later the Nuclear Regulatory Commission.[17]

As for Respondents' conduct as "advocate" before these federal agencies, the ASLB found *inter alia* that ". . . the Attorney General

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Nonetheless, this Court has suggested that "abnormal" delays in governmental action may effect a taking. *See Agins v. City of Tiburon*, 447 U.S. 255, 263, n.9 (1980), quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939) ("Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered a "taking," in the constitutional sense.' ") (emphasis added).

Likewise, this Court has suggested that interference with property rights or interests, precipitated by a governmental entity acting in bad faith or with ill motives, may give rise to federal claims. *See Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) citing *United States v. Reading Co.*, 226 U.S. 324, 357 (1913) ("Acts generally lawful may become unlawful when done to accomplish an unlawful end..."). *See also Lucas*, 112 S.Ct. at 2906 (where Justice Blackmun, in dissent, predicated, in part, his conclusion that South Carolina's "police power" defense should preclude Lucas' taking claims upon the fact that Lucas ". . . did not contend . . . that the legislature was motivated by anything other than a desire to minimize damage to coastal areas."). *Compare Flores v. Pierce*, 617 F.2d 1386, 1391 (9th Cir.), *cert. denied*, 449 U.S. 875 (1980) (recognizing a constitutional violation where "the rigors of the governmental or administrative process are imposed upon certain persons with an intent to burden, hinder, or punish them by reason of their race or national origin . . .").

[16] *See* n. 8, *supra*.

[17] *See* Atomic Energy Act, 42 U.S.C. §2011 et seq. (1973). *See also Pacific Gas & Elec. Co. v. State Energy Resources Construction and Development Comm'n*, 461 U.S. 190, 213 (1982).

attempted to manufacture the evidence he [sought] to use as a license impediment". *In the Matter of Public Service of New Hampshire*, Docket Nos. 50-443-OL and 50-444-OL, Memorandum and Order Ruling on Massachusetts Attorney General's Motion To Accept As Exhibit (ASLB August 7, 1989). Moreover, the ASLB found that Respondents had refused to publish their radiological response plan in contravention of P.L. 96-294 "to further a litigation strategy intended to defeat the [Seabrook] application for an operating license." *Id.*, Partial Initial Decision - Seabrook Plan for Massachusetts Communities and FEMA Graded Exercise (ASLB November 9, 1989).[18]

Although Respondents' "regulation" of Seabrook was circuitous, given that Respondents were without authority to directly regulate a nuclear power facility, it nonetheless remains that Respondents deliberately exercised the state's police power in opposition to Seabrook, obstructed the federal licensing process, deliberately ignored principles of federal *res judicata,*[19] and unduly delayed the licensure of Seabrook by approximately four (4) years. Such conduct should be deemed "regulatory" for Fifth Amendment purposes.[20] This is particularly true where, as here, Respondents did *not inadvertently* "take" Petitioners' property through the enactment of

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[18]*See also* n.7, *supra.*

[19]*See* n.8, *supra.*

[20]*Compare Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (where this Court acknowledged that the imposition by state courts of compensatory and punitive damages in cases involving nuclear accidents could constitute improper "regulation" of nuclear power in violation of the Supremacy Clause); *County of Suffolk v. Long Island Lighting Co.*, 554 F. Supp. 399, 405 (E.D.N.Y. 1983), aff'd, 728 F.2d 52 (2d Cir. 1984) (where a County's Complaint — seeking injunctive relief against the Shoreham nuclear facility — was held to be preempted as "regulatory conduct" designed to "regulate through the courts" the radiological safety of the Shoreham nuclear facility; *Citizens For An Orderly Energy Policy, Inc. v. County of Suffolk*, 604 F. Supp. 1084, 1098 (E.D.N.Y. 1985) (stating that "... mere interference with a licensing process may under some circumstances violate a constitutionally protected liberty interest); *Flores v. Pierce*, 617 F.2d 1386, 1391 (9th Cir.), cert. denied, 449 U.S. 875 (1980) (holding that "the policy of [government] officials to force [minority liquor license] applicants to undertake extraordinary measures for its issuance" can constitute a denial of equal protection even where the decision to approve the license rests with a superior governmental agency).

what they believed to be legitimate land-use regulations. Rather, Respondents *deliberately obstructed* federal licensing procedures with the objective that Seabrook "never operate." *See* n.7, *supra.* That Respondents lacked legitimate authority to "regulate" Seabrook in the strictest sense of that word[21] should in no way insulate either their egregious conduct or misconduct from Constitutional scrutiny under the Takings Clause.

Indeed, "[i]t would be a very curious and unsatisfactory result if"[22] the proper exercise of a state's police power, which temporarily denies property owners all "economically viable use" of their property, gives rise to a compensable taking, while the misuse or abuse of a state's police power — in violation of, inter alia, principles of federal preemption and *res judicata* — escapes scrutiny under the "Takings" clause and leaves Petitioners without redress for the substantial Constitutional harms they have suffered.[23]

Here, executives and legislators within the Commonwealth of Massachusetts deliberately obstructed federal licensing proceedings

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[21]*See* n. 17, *supra. See also Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1154 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972); *City of Cleveland v. Pub. Util. Comm'n of Ohio*, 414 N.E.2d 718, 720 (1980); *Public Interest Research Group of New Jersey, Inc. v. New Jersey*, 377 A.2d 915 (1977); and *State ex rel. Util. Consumers Council v. Pub. Serv. Comm'n of Missouri*, 562 S.W.2d 688 (Mo. App. 1978), cert. denied, 439 U.S. 866 (1978).

[22]*Pumpelly*, 13 Wall. at 177-178, quoted in *First English*, 482 U.S. at 316.

[23]Having erroneously concluded that no taking had occurred, the Appeals Court (and, likewise, the trial court) never reached the question of whether or not Petitioners had articulated a protectable property interest. Nonetheless, it should be noted that Petitioner Hudson and all of the Necessary Parties hereto own various interests in Seabrook under the "Agreement for Joint Ownership, Construction and Operation of New Hampshire Nuclear Units" dated May 1, 1993, as amended.

Moreover, the remaining Petitioners invested in Seabrook through certain Power Sales Agreements whereby they became holders of substantial percentages of the electric generating capacity of Seabrook and were required, under the "take or pay" provisions of those contracts, to pay for their respective percentages of Seabrook's generating capacity during the period of undue delay which resulted from Respondents' obstruction of the licensing process.

It is well settled that reasonable investment-backed expectations of the type alleged here are protectable property interests. *See Kaiser Aetna v. United States*, 444 U.S.

and thereby took Petitioners' property and impaired certain of their contracts. Now, that state's judiciary holds that such conduct is insulated from scrutiny under federal Constitutional law, binding precedent of this Court, and principles of both federal preemption and *res judicata*. To the contrary, where, as here, ". . . state power is used as an instrument for circumventing a federally protected right" it will not be "insulated from federal judicial review." *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

This Court should take the opportunity to reverse the Appeals Court's rejection of the temporary regulatory takings doctrine set forth in *First English* and *Lucas, supra.*

This Court should also take the opportunity to reverse the Appeals Court's dismissal of Petitioners' Contract Clause claims on the basis of an impermissible factual finding, contrary to the binding allegations of predicate legislative conduct set forth in Petitioners' Amended Complaint. (*Compare* Appendix A-10 *with* Appendix F).

Finally, this Court should grant certiorari here to explicitly rule that a temporary taking of property resulting from a state's deliberate obstruction of a federal licensing procedure is compensable as a

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164, 179 (1979) (holding that ". . . the consent of individual officials representing the [government] . . . can lead to the fruition of a number of expectancies embodied in the concept of "property" - expectancies that, if sufficiently important, the Government must condemn and pay for . . ."). *See also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978), citing *United States v. Willow River Power Co.*, 324 U.S. 499 (1945) and *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (holding that government action which causes economic harm gives rise to a compensable "taking" where the challenged action "interfere(s) with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes."). *Cf. Allied-General Nuclear Services v. United States*, 839 F.2d 1572, 1577 (Fed. Cir. 1988), cert. denied, 488 U.S. 819 (1988) (holding that ". . . the principle [of implied contract] would apply if the government induced private capital to embark on a project, expecting for its part to be called on to cooperate in making the project a success, or at least to do nothing harmful, and the contractor invested his capital, expecting it to be sheltered from adverse government action); *Appeal of Public Service Co. of New Hampshire*, 454 A.2d 435, 439-40 (1982) (holding that a party who relies in good faith on the absence of any regulation which would prohibit a proposed project, and makes substantial construction on the project or incurs substantial liabilities relating directly thereto, or both, acquires a vested right to complete the project in spite of the subsequent adoption of an ordinance prohibiting the same. "If ever a case for vesting applied, it is the expenditure of hundreds of millions of dollars to date at Seabrook!").

temporary regulatory taking under the Fifth and Fourteenth Amendments to the United States Constitution where, as here, the conduct "goes too far".[24]

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the Rescript and Opinion of the Appeals Court for the Commonwealth of Massachusetts in this matter.[25]

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE

Counsel for Petitioners

Dated: July _____, 1993 By: _____
Thomas J. Heiden*

By: _____
Meg Hackett Carrier

*Counsel of Record

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[24] *Pennsylvania Coal*, 260 U.S. at 415.

[25] If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be summarily reversed in light of this Court's opinions in *First English* and *Lucas*, and/or in light of the Appeals Court's blatant disregard for Petitioners' binding allegations of legislative conduct to support their Contract Clause claims. (*See* n.3, *supra* and Appendix F).

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT FOR THE COMMONWEALTH,

AT BOSTON, February 25, 1993

IN THE CASE OF

MUNICIPAL LIGHT COMPANY OF ASHBURNHAM & others

vs.

COMMONWEALTH & others

pending in the Superior

Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,-

The judgment of dismissal is affirmed.

BY THE COURT,

Nancy Turck Foley, Clerk.

February 25, 1993

91-P-910 Appeals Court

MUNICIPAL LIGHT COMPANY OF ASHBURNHAM & others[1]
vs.
COMMONWEALTH & others.[2]

No. 91-P-910

Suffolk. November 12, 1992. - February 25, 1993

Present: Brown, Kass, & Ireland, JJ.

Practice, Civil, Complaint, Motion to dismiss. *Electric Company. Estoppel. Contract*, Implied. *Commonwealth*, Claim against. *Constitutional Law*, Constitutional challenge by government agency, Impairment of contracts. *Eminent Domain*, What constitutes taking. *Corporation*, Stocholder's [sic] derivative suit.

Civil action commenced in the Superior Court Department on December 9, 1988.

The case was heard by *Patrick J. King*, J., on a motion to dismiss.

Thomas J. Heiden of Michigan (*Meg Hackett Carrier* of Michigan, & *Jonathan W. Blodgett* with him) for the plaintiffs.
Peter Sacks, Assistant Attorney General, for the Commonwealth & others.

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[1]Eight other municipal light companies and the towns and cities in which those municipal light companies are located, viz., Ashburnham, Boylston, Hudson, Paxton, Peabody, Shrewsbury, Templeton, Wakefield, and West Boylston.

[2]The director of the Massachusetts Civil Defense Agency, the Governor, and the Attorney General. The plaintiffs also named various other municipal light companies, the Vermont Electric Cooperative, and the Massachusetts Municipal Wholesale Electric Company as necessary parties. None of this latter category of parties made claims or, so far as appears from the docket, filed an appearance; none is involved in this appeal.

KASS, J. In their brief, the plaintiffs, who are municipal light companies or departments, state a prodigious twenty-six issues on appeal but these rather quickly boil down to three. All are based on actions taken by the Commonwealth to delay the operation of Seabrook Nuclear Power Plant Unit 1 ("Seabrook") in Seabrook, New Hampshire. Seabrook, since the plan for its construction surfaced in 1968, has generated seemingly countless reactions of super-heated litigation and civil disobedience. As a consequence of the Commonwealth's delaying actions, the plaintiffs (which we shall sometimes refer to as the light companies) claim financial losses attributable to Seabrook having come on line several years later than would have been the case, but for the Commonwealth's machinations. The three issues to which the many urged can be reduced are: (1) whether the Commonwealth[3] is liable for damages to the light companies on theories of estoppel or implied contract; (2) whether the Commonwealth made a de facto taking of property without just compensation; and (3) whether the Commonwealth unconstitutionally impaired contractual obligations of which the light companies had the benefit.

A judge of the Superior Court, acting on a motion to dismiss under Mass.R.Civ.P. 12(b), 365 Mass. 755 (1974), dismissed the complaint for failure to state a claim for which relief can be granted. We affirm.

We summarize facts alleged in the complaint which, for purposes of reviewing dismissal of a complaint under Mass.R.Civ.P. 12(b)(6), we accept as true. *Nader v. Citron*, 372 Mass. 96, 98 (1977). We do not purport to make any determination whether the facts alleged and which we recite are accurate.

During the early to mid-1970's, in response to a felt need for capacity to generate more electric power, the Legislature, by the enactment of St. 1973, c. 571,[4] created the New England Power Pool and, by St. 1975, c. 775, created the Massachusetts Municipal Whole-

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[3]As the various individual defendants acted in their official capacities, we shall, as a convenience, refer to all the defendants collectively as the Commonwealth.

[4]Codified at G. L. c. 164A.

sale Electric Company ("MMWEC").[5] Those statutes enabled, and thereby encouraged, electric utility companies in Massachusetts to participate in jointly owned power plants in or out of the Commonwealth. In 1975, Seabrook was the only jointly owned power plant planned in New England available to outside participants, and the immediate purpose of the MMWEC legislation was to facilitate and encourage participation in Seabrook.

Also in 1975, the Department of Public Utilities (DPU) determined that the Seabrook plant was necessary to meet the future power needs of the Commonwealth. The following year, 1976, the Energy Facilities Siting Council approved MMWEC's participation in the Seabrook project. From mid-1976 to late 1979, the DPU approved four bond issues (presumably the issuer of the bonds was MMWEC — the complaint does not say) which enabled MMWEC to acquire its interest (11.59340%) in Seabrook. Relying on those authorizations and approvals, the light companies acquired a substantial interest in Seabrook through the medium of membership in MMWEC, memberships which involved entry by the light companies into power sales agreements ("PSAs") with MMWEC. Under the PSAs, the light companies were obligated to buy a stated percentage of the generating capacity of Seabrook.[6] The PSAs contain what the parties call a "take or pay" provision, whereby the light companies pay their pro rata share of MMWEC's costs applicable to the shared facility, irrespective of whether the light companies buy electricity and, indeed, irrespective of whether the facility has electricity to sell.[7]

Contrary to its encouragement of Seabrook through the various authorizations and approvals (so the complaint continues), the Com-

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[5]MMWEC acts as a wholesaler of electricity which it purchases from large generating facilities and sells to participating municipal light companies. Its structure and how it operates are described in *Massachusetts Mun. Wholesale Elec. Co. v. Danvers*, 411 Mass. 39, 40-42 (1991), also a case arising out of the Seabrook project.

[6]The PSA mechanism does not apply to Hudson, which did not join MMWEC but bought a direct interest in the Seabrook project.

[7]How the PSAs function is described in *Massachusetts Mun. Wholesale Elec. Co. v Danvers*, 411 Mass. at 42.

monwealth, acting through its director of civil defense, its Governor, and its Attorney General, impeded the licensure of Seabrook by the United States Nuclear Regulatory Commission (NRC). The Massachusetts authorities delayed licensure by persistently raising questions about the safety of Seabrook, notably the means to evacuate population from the environs of Seabrook in the event of a radiological emergency. Apart from objecting that inadequate safety precautions were being taken, the Commonwealth declined to formulate an emergency response plan. On March 27, 1986, the Governor stated publicly that he would oppose final licensure of Seabrook unless fallout shelters were provided on nearby beaches.

On October 8, 1986, the Seabrook plant was complete and stood ready for commercial operation. All conditions for operation had been satisfied except for the Massachusetts portion of the radiological emergency response plan. Successive attorneys general[8] continued to oppose the grant of an operating license by the NRC. On February 3, 1988, the Attorney General wrote a letter to the light companies which restated his and the Governor's view that the Seabrook plant should and would not operate and urged the light companies to withdraw from the project, even if that were a default of their obligations under the PSAs. Approximately two years later, on March 15, 1990, the NRC issued a full power operating license to Seabrook.

As a consequence of the delays engineered by the Commonwealth through its officers, the plaintiffs suffered damage because they had to pay their share of the carrying costs (e.g., bond interest) and suffered further damage on account of the electric power they did not obtain from Seabrook and had to buy elsewhere.

It is familiar doctrine that a complaint can be dismissed for failure to state a claim for which relief can be granted only if a reading of the complaint establishes beyond doubt that the facts alleged, accepting them as true and drawing all inferences in the plaintiff's favor, do not add up to a cause of action which the law recognizes. The plaintiff has to plead itself out of Court. *Nader v. Citron*, 372 Mass. at 98. *Connerty v. Metropolitan Dist. Comm'n.*, 398 Mass. 140, 143 (1986). *New England Insulation Co. v. General Dynamics Co.*, 26 Mass. App. Ct. 28, 29-30 (1988). A complaint should not be dismissed because it asserts a novel or extreme theory of liability or

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[8]Mr. Francis X. Bellotti and later Mr. James M. Shannon.

improbable facts. *Coolidge Bank & Trust Co. v. First Ipswich Co.*, 9 Mass. App. Ct. 369, 370 (1980). *Jenkins v. Jenkins*, 15 Mass. App. Ct. 934 (1983).

1. *Liability based on implied contract and estoppel.* Through establishment of the New England Power Pool and MMWEC, approval of the Seabrook site by the Energy Facilities Siting Council, and approval (through the DPU) of MMWEC's bonding authority, the plaintiffs say that the Commonwealth encouraged their investment in Seabrook. On that encouragement the plaintiffs claim to have reasonably relied and spent a great deal of money.[9] They say that the Commonwealth is estopped to deny an implied contractual obligation to support the Seabrook project and to refrain from acting so as to impede it.

We turn first to the question of estoppel. Generally, the principles of estoppel are not applicable against the government in connection with its exercise of public duties, particularly when the government is acting in the public interest and safety, as its duly constituted officials see that interest. *Phipps Products Corp. v. Massachusetts Bay Transp. Authy.*, 387 Mass. 687, 693 (1982), and cases cited. *Fitchburg Gas & Elec. Light Co. v. Department of Pub. Utilities*, 395 Mass. 836, 857 (1985) (also a case arising out of the Seabrook project). *Risk Management Foundation of Harvard Med. Insts*, 407 Mass. 498, 509-510 (1990). *Gamache v. Mayor of No. Adams*, 17 Mass. App. Ct., 291, 294 (1983).

Here, the Commonwealth, acting through two of its highest officials, the Governor and the Attorney General, and through the director of its civil defense agency, consistently opposed licensure of Seabrook on the public policy ground that operation of the plant posed a significant health and safety risk to the public. Governmental officials need to be free to act in accordance with their constitutional and statutory authority in such manner as they think is in the public interest without encumbrance from earlier collateral decisions which may have suggested a different tendency so far as the public issue is concerned. See, as an illustration, *Hood Industries, Inc. v. City Council of Leominster*, 23 Mass. App. Ct. 646, n.1

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[9]The complaint alleges that the plaintiffs and MMWEC "directly and indirectly devoted $1 [b]illion to Seabrook." If MMWEC's share is 11.59340% an Hudson has a .07% share, the indirect investment of the plaintiffs would be in the neighborhood of $116,600,00.

(1987), in which the mayor and the regional chamber of commerce encouraged the Plaintiff to buy land for a manufacturing plant but the city council could lawfully deny a permit to store inflammable liquids. To the degree that it has not become the subject of an express and authorized contract, a public policy is necessarily subject to changes of view and changes of administration. See *Phipps Prod. Co. v. Massachusetts Bay Transp. Authy.*, 387 Mass. at 689, 693-694.

The light companies do not buttress their case by alleging that the Governor and Attorney General were acting to advance their personal political agendas. Opposing Seabrook was within the scope of the general duty of those officials to protect the public interest; it is their actions that matter, not their states of mind.

Related to the theory of estoppel is the implied contract claim. The administrative actions on which the plaintiffs rely, i.e., the siting approval and bonding authority, cannot reasonably be interpreted as an unconditional approval of the Seabrook project. Bonding authority involved a fiscal inquiry. See *Fitchburg Gas & Elec. Light Co. v. Department of Pub. Utilities,* 394 Mass. 671, 680-681 (1985). Safety details had yet to be confronted. Nothing in the statutes creating the New England Power Pool (St. 1973, c. 571) or MMWEC (St. 1975, c. 775) binds the Commonwealth to a particular power facility. Those statutes are purely enabling and mention no particular power facility. As to the Commonwealth's attitude toward Seabrook, it was never one of unalloyed support. There were cross-currents of opposition to the project by Massachusetts as early as 1975, as the complaint states. Upon examination, the statutes and administrative decisions do not provide a reasonable basis for a conclusion that the Commonwealth was unconditionally committed to Seabrook.

2. *De facto taking by the Commonwealth.* The light companies complain that the Commonwealth, by its opposition to Seabrook, so damaged the economic interests of the light companies that it in effect made a taking by eminent domain of their property. Of course there was no taking in the formal sense of G. L. c. 79, §1. If there is a taking claim it must rest upon G. L. C. [sic] 79, §10 (damage to property without a formal taking), or constitutional requirements of just compensation under the Fifth Amendment to the Constitution of the United States or art. 10 of the Declaration of Rights of the Massachusetts Constitution.

The trial judge disposed of the taking claim on the ground that public entities such as Hudson and the light companies may not make claims for damages based on constitutional rights against the State or another State agency. See *Spence v. Boston Edison Co.*, 390 Mass. 604, 610 (1983); *Trustees of Worcester State Hosp. v. The Governor,* 395 Mass. 377, 380 (1985). There have been occasions, however, when superior public authorities have appropriated to public use property owned by a body politic and corporate which was engaged in a proprietary function, such as a municipal light company, and in those instances eminent domain damages were held payable. *Proprietors of Mt. Hope Cemetary v. Boston,* 158 Mass. 509, 511-512 (1893). *Higginson v. Treasurer & School House Commrs. of Boston,* 212 Mass. 583, 585-589 (1912). *Cambridge v. Commissioner of Pub. Welfare,* 357 Mass. 183, 185-187 (1970). 1 & 2 Nichols, The Law of Eminent Domain 2.225[1], 5.550[6] (1993).

In its application to tort liability, the "governmental function" and "proprietary function" distinction has been the subject of censorious comment. See *Morash & Sons, Inc. v. Commonwealth,* 363 Mass. 612, 622 (1973); *Whitney v. Worcester,* 373 Mass. 208, 213-215 (1977); *Green v. Commonwealth,* 13 Mass. App. Ct. 524, 525-526 (1982). Thus far there do not appear to have been occasions to examine the vitality of the distinction in the context of takings by superior governmental agencies, and an occasion so to do is not present in the instant case because there has been no taking.

Although takings generally involve the appropriation or damage of physical property by a State agency, i.e., acquiring title to or occupying the property, compensable takings may occur when the governmental action deprives an owner of virtually all of that owner's interest in the property affected. *Cayon v. Chicopee,* 360 Mass. 606, 609 (1971). By way of illustration, an owner of business premises was held to have a right to taking damages when an order of taking deprived the business of access to a public way which previously provided the only access. *Cann v. Commonwealth,* 353 Mass. 71, 73-75 (1967). Less convenient access, however, is not a ground for compensation. *Tassinari v. Massachusetts Turnpike Authy.,* 347 Mass. 222, 223-224 (1964). *LaCroix v. Commonwealth,* 348 Mass. 652, 657 (1965). What the plaintiffs in the instant case complain of falls in the latter category.

There are economic consequences to the plaintiffs by reason of

the Commonwealths's safety demands upon Seabrook but they are collateral consequences. There are collateral consequences from all manner of governmental decisions, e.g., to levy a tax; to impose a tariff; to impose standards of manufacture; to build a new and better road; to locate a new airport; to revoke a subsidy; or to reduce the budget for public safety. There would be no end to assaults on the public purse if persons who suffered economically by reason of public policy or changes in public policy could claim a de facto taking of their property. To this we add the observations (1) that the Commonwealth has not and, of course, could not acquire, hem in, shut down or even inhibit the Seabrook facility, which is located in New Hampshire, and (2) that the interest of the plaintiffs in Seabrook retains value because the generating plant is operating. Obtaining that value has perhaps taken longer and cost more because of the Commonwealth's activity, but that is analogous to inconvenience.

What we have said applies to the theory argued by the plaintiffs that they have suffered a regulatory taking. See *Lucas v. South Carolina Costal Council,* 112 S.Ct. 2886 (1992); *Wilson v. Commonwealth,* 413 Mass. 352 (1992). The plaintiffs have not been totally deprived of the value of their property, id. at 355, and the Commonwealth has not regulated and cannot regulate Seabrook. Its activities have been confined to the role of an advocate before those Federal agencies which can and do regulate Seabrook.

A further disability which the plaintiffs suffer as taking claimants is that they are not the applicant for the operating license for Seabrook. As stockholders have an interest in a corporation; plaintiffs have an interest in Seabrook. Stockholders may not in their own names bring an action for damage to the corporation in which they hold stock; they may bring a derivative action in the name of the corporation. *Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennnings & Berg, P.C.,* 405 Mass. 506, 513 (1989). *Vincel v. White Motor Corp.,* 521 F.2d 1113, 1118 (2d Cir. 1975). *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk,* 604 F.Supp. 1084, 1091 (E.D.N.Y. 1985) (utility ratepayers and shareholders lacked standing to claim unlawful interference with utility's application for an operating license from the Nuclear Regulatory Commission).

3. *Impairment of contract claim.* The last clutch of claims asserted by the plaintiffs is that the action of the Commonwealth impaired the contractual rights which they had in relation to Seabrook

and, thus, the Commonwealth acted contrary to Art. I, §10, cl. 1, of the United States Constitution, commanding that "[n]o State shall... pass any ... Law impairing the Obligation of Contracts ..." That constitutional provision aims "at the legislative power of the State, and not at decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.,* 125 U.S. 18, 30 (1888). *Hanford v. Davies,* 163 U.S. 273, 278 (1896). See *United States Trust Co. v. New Jersey,* 431 U.S. 1, 15-16 (1977); *Boetti v. Ogden Suffolk Downs, Inc.,* 587 F. Supp. 1048, 1050 (D.Mass. 1984). The plaintiffs do not point to any act of the Legislature which impaired their contract. An additional obstacle for the plaintiff is the inhibition, previously averted to, upon the assertion of constitutional claims by a public entity created by the State against the State. See *Spence v. Boston Edison Co.,* 390 Mass. at 610.

The complaint was rightly dismissed as failing to state a claim for which relief can be granted. The judgment of dismissal is affirmed.

So ordered.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. SS-6917B

THE MUNICIPAL LIGHT COMPANIES OR DEPARTMENTS OF ASHBURNHAM and others,[1]
Plaintiffs

vs.

COMMONWEALTH OF MASSACHUSETTS and others,[2]
Defendants

vs.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY and others,[3]
Third-Party Plaintiffs

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT ON THE DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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[1]Boylston, Hudson, Paxton, Peabody, Shrewsbury, Templeton, Wakefield and West Boylston, Massachusetts, individually and on behalf of their ratepayers, and the Towns or Cities of Ashburnham, Boylston, Hudson, Paxton, Peabody, Shrewsbury, Templeton, Wakefield, and West Boylston, Massachusetts.

[2]Robert Boulay, Director of the Massachusetts Civil Defense Agency, officially; Michael Dukakis, Governor of the Commonwealth of Massachusetts; and James Shannon, Attorney General of the Commonwealth of Massachusetts.

[3]The Taunton Municipal Lighting Plant, United Illuminating Company, Vermont Electric Cooperative, and the Municipal Light Companies or Department of Braintree, Danvers, Georgetown, Groton, Hingham, Holden, Holyoke, Ipswich, Littleton, Mansfield, Marblehead, Middleborough, Middleton, North Attleboro, Reading, South Hadley, Sterling, and Westfield.

BACKGROUND

This action for damages and equitable relief stems from the controversy surrounding the granting of an operating license for the Seabrook Nuclear Power Plant Unit 1 (Seabrook). The plaintiffs claim that the defendants' opposition to the licensing of Seabrook has unjustly stymied their efforts to obtain a full-power operating license for Seabrook, and has caused them to suffer irreparable harm, thereby entitling them to damages and equitable relief. The defendants are now before this court on a motion to dismiss Counts III through VII of the amended complaint pursuant to Mass. R. Civ. P. 12(b)(1) and 12(b)(6). The plaintiffs filed a Notice of Dismissal of Counts I and II on or about July 18, 1990. After a hearing and review of the record, this court allows the motion to dismiss for the following reasons.

DISCUSSION

A complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it can be shown that, even when accepting the complaint as true and drawing all inferences in favor of the plaintiffs, there is no set of facts which would entitle the plaintiffs to relief. *Nader v. Citron*, 372 Mass. 96, 98 (1977). Doubts or misgivings as to whether a claim is provable or even credible are not a proper basis for dismissal of a claim under Mass. R. Civ. P. 12(b)(6). *Gibbs Ford, Inc. v. United Trucking Leasing Corp.*, 399 Mass. 8, 13 (1987); *Wrightson v. Spaulding*, 20 Mass. App. Ct. 70, 72 (1985). A claim will not be dismissed simply because it asserts a new or extreme theory of liability or improbable facts. *Jenkins v. Jenkins*, 15 Mass. App. Ct. 934 (1983).

I. Count III

Count III of the plaintiffs' amended complaint, sounding in contract, alleges that because of various actions taken by the state,[4] the plaintiffs were induced to participate in Seabrook and ultimately to

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[4]These actions include the General Court of the Commonwealth's encouragement of Massachusetts Utilities and Municipal Light Departments' (MLDS') participation in the Seabrook project via the New England Power Pool (NEPOOL) statute (G.L. c. 164A, §§ 1-27), and the Massachusetts Municipal Wholesale Electric Company (MMWEC) statute (G.L. Spec. L. c. 13 §§ 1-25), the Massachusetts Energy Facilities Siting Council's approval of the Seabrook site, and the Department of Public Utilities' approval of bonding authority for Seabrook. Amended Complaint at ¶¶87-90.

devote $1 billion to the project. However, by the actions of defendants Dukakis, Shannon and Boulay, who opposed the licensing of Seabrook and who refused to publish the emergency response plan, they claim that the Commonwealth breached its implied contract with the [sic] them; they now seek damages for the loss of their reasonable investment backed expectations.

This court is not persuaded by the plaintiffs' argument that, because certain approvals were given to them, the state was somehow contractually obligated to approve and authorize the Seabrook project. The Supreme Judicial Court has addressed a similar argument in a case involving MMWEC and DPU. In *Fitchburg Gas and Electric Light Co. v. Department of Public Utilities,* 395 Mass. 836, 856 (1985), MMWEC contended that, because it relied on prior DPU approvals in entering contracts, issuance of MMWEC bonds was contractually obligated. The court rejected this argument for two reasons. First, it held that a department's reasonable exercise of its statutory authority was not subject to an amendment through the creation of a contract with those it is intended to govern; second, the court expressly refused to apply principles of estoppel to public utilities where the application of those principles would negate legal requirements intended to protect the public interest. *Id.* at 857.

Such reasoning is indeed applicable here. This court will not find that either the Governor, Attorney General, or Director of this state's Civil Defense Agency is estopped from taking any steps within their broad authority, simply because other government agencies granted site approvals or bonds for the Seabrook project. Private entities may not constrain the abilities of public officials to take action they believe to be in the public interest merely by acquiring some preliminary approvals from other agencies of the state. The principles of estoppel are clearly inapplicable here.

The plaintiffs' implied contract argument must also fail. They allege that the MMWEC and NEPOOL statute, as well as the siting and bond approvals, were reasonable representations upon which they could rely, and which ultimately created a contractual relationship between the parties. The three defendants, however, took positions regarding the safety and licensing of Seabrook, matters not at all related to the prior approvals upon which the plaintiffs claim they relied. See, e.g., G.L. c. 164, §14. The plaintiffs knew the limits and scope of the approvals they had received; for them to assume that these approvals provided carte blanche governmental

approval for the Seabrook project as a whole is unreasonable as a matter of law.

Most importantly, it must be noted that the plaintiffs themselves recognize that the Commonwealth has opposed the Seabrook project since as early as 1975. Amended Complaint at 27. Simply because the plaintiffs invested money in the belief that, based on prior approvals, all additional approvals would be forthcoming, does not mean that an enforceable contract was formed. The plaintiffs' assumption that Seabrook would receive the remaining necessary approvals, and that no Commonwealth official would dispute those approvals, will not support their claim of breach of implied contract.

Lastly, even if such an implied contract was created, it would be unenforceable. A state has no power to enter into binding contracts *not* to exercise its police power at a future date. *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 23 n.20 (1977); *Boston Elevated Railway v. Commonwealth*, 310 Mass. 528, 550-553 (1942). Particularly where the health and safety of its citizens are involved, a contract will not stand in the way of the defendants ability to exercise their legal authority.[5] Therefore, the defendants' motion to dismiss Count III will be *ALLOWED*.

II. Counts IV-VII

In Counts IV and VII, the plaintiffs allege that they have a proprietary interest in Seabrook, and that the actions of defendants Dukakis and Shannon, in opposing the licensing of Seabrook, manifest the Commonwealth's intention to take their interest in Seabrook for public purposes in violation of the Massachusetts and United States Constitutions. Likewise, in Counts V and VI the plaintiffs, the Town of Hudson and the MLDs, claim that the two defendants have violated the Contract Clause of the U.S. Constitution (Article I, 10, cl. 1), by "interposing 'insuperable obstacles to the licensure' of Seabrook." Hudson is a party to the Seabrook Participation Agree-

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[5]This court has found no statute restricting either the Governor, the Attorney General, or the head of the Civil Defense Agency from vocalizing or publicizing their concerns about a nuclear power plant.

[6]This Agreement purportedly deals with the construction, licensing and operation of Seabrook. Based on this Agreement, Hudson asserts that it will be entitled to

ment,[6] while the MLDs are mutual contracting parties to a variety of power sales agreements.[7]

The plaintiffs seek to recover monetary damages for the losses they suffered as a result of these constitutional violations. All four of these counts, however, must be dismissed, because government entities may not challenge the constitutionality of the acts of another of the state's agencies. *Spence v. Boston Edison Co.*, 390 Mass. 604, 610 (1983).

In *Spence*, the court held that

> . . . it is one thing to allow governmental agencies the protections of a private consumer where the parties are both acting in a private capacity and where there is absolutely no "public aspect" to the transaction. It is quite another, however, to permit an agency created by statutory authority to raise constitutional challenges to procedures developed by legislative authority.

Id. at 610. Here, the plaintiffs are not suing the defendants based on their business practices or a commercial transaction between them. Rather, they challenge the defendants' participation in the approval process itself. Thus, this case falls squarely within the holding of *Spence.*

Moreover, there is absolutely no dispute that each of the plaintiffs are publicly created entities, formed to effect public functions. The Town of Hudson, although a part-owner of Seabrook, is a municipal corporation under the Massachusetts Constitution. Amended Complaint at 4, 9, 99. The statute which created MMWEC, Spec.L. c. 12, §2, expressly states that it is a body politic and a corporate and political subdivision of the Commonwealth. It is "a public instrumentality and the exercise of [its] powers . . . shall be deemed and held to be the performance of an essential public function." The MLDs are electric departments or lighting plants of the plaintiff towns of the Commonwealth.

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percentages of produced electricity upon the completion of Seabrook. Amended Complaint at ¶99.

[7]These power sales agreements pass the burdens and benefits of MMWEC's interest in Seabrook through to the MLDs. Amended Complaint at ¶105.

The constitutional claims of the plaintiffs are therefore barred by the long-standing and broad prohibition on constitutional challenges by governmental entities to acts of their creator state. Therefore, Counts IV through VII will be dismissed.[8]

ORDER

Accordingly, it is hereby *ORDERED* that defendants' motion to dismiss Counts III through VII of plaintiffs' amended complaint be *ALLOWED*, and judgment shall enter dismissing said amended complaint.

Patrick J. King
Justice of the Superior Court

Dated: December 28, 1990

[8]Also as in *Spence*, the constitutional provisions invoked by the plaintiffs are rights given to individual citizens which may not be infringed by the government. Specifically, the words used to describe those entitled to constitutional protection are "person" or "citizens" (U.S. Constitution, Amendments V and XIV), and "individual" (Declaration of Rights, Article 10). The plaintiffs here, according to these terms, do not have such rights. *Spence*, *supra* at 608.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION

THE MUNICIPAL LIGHT COMPANIES OR DEPARTMENTS OF ASHBURNHAM, et als. [sic], No. 88-6917

PLAINTIFF(S)

v.

COMMONWEALTH OF MASSACHUSETTS, et als. [sic],

DEFENDANT(S)

JUDGMENT ON MOTION TO DISMISS
(PURSUANT TO MASS.R.CIV.P.12(b))

THIS ACTION CAME ON TO BE HEARD ON THE MOTION Of DEFENDANT(S) _____
TO DISMISS [COUNTS III-VII OF] THE ACTION, AND THE COURT, KING J., PRESIDING, HAVING ALLOWED THE SAID MOTION, IT IS HEREBY ORDERED AND ADJUDGED THAT THE ACTION BE DISMISSED, AND THAT DEFENDANT RECOVER COSTS.

DATED AT BOSTON, MASSACHUSETTS, THIS 2nd DAY OF JANUARY, 1991.

MICHAEL JOSEPH DONOVAN
CLERK/MAGISTRATE

By: _____
ASSISTANT CLERK

APPENDIX C

Supreme Judicial Court For The Commonwealth Of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 725-8055

Jonathan W. Blodgett, Esquire
Blodgett, Delaney & Donovan
40 Lowell Street
Peabody MA 01960

RE: Docket No. FAR-06545

MUNICIPAL LIGHT COMPANY OF ASHBURNHAM & others
vs.
COMMONWEALTH & others

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on April 27, 1993, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: April 27, 1993

To: Jonathan W. Blodgett, Esquire
Peter Sacks, A.A.G.

APPENDIX D

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV, SECTION 1 TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

ARTICLE I, SECTION 10, CLAUSE 1 TO THE UNITED STATES CONSTITUTION

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

APPENDIX F

Petitioners included the footnote set forth below at p. 19 of their Reply Brief filed in the Massachusetts Appeals Court. This same footnote was referenced and paraphrased in Petitioners' Application For Leave To Obtain Further Appellate Review By The Full Supreme Judicial Court.

22/ The Commonwealth's contention that Counts V and VI of the Amended Complaint must be dismissed for their failure to allege *legislative* (as opposed to executory) conduct in violation of the Contract Clause is also without merit and, at the very least, premature. (*See* Brief of Defendants/Appellees at pp. 46-49). Given that the lower court denied the MLDs the opportunity to conduct *any* discovery in this matter, the precise nature and scope of the legislative conduct undertaken by the Commonwealth cannot be specifically alleged. Nonetheless, there has been substantial legislative entanglement. First, through the NEPOOL Statute enacted in 1973, the General Court of the Commonwealth encouraged the MLDs to increase the region's share of nuclear generating capacity. Second, through the MMWEC statute enacted in 1975, the General Court of the Commonwealth encouraged and enabled the MLDs to participate in Seabrook and other such jointly-owned power plants. Third, in approving the Seabrook site, the Massachusetts Energy Facilities Siting Council exercised the Commonwealth's police power in favor of the MLDs' participation in Seabrook. Fourth, the Department of Public Utilities, under legislative authority delegated by the General Court of the Commonwealth, determined both that the Seabrook plant was necessary to meet the future power needs of the Commonwealth, and that a series of bond issues was reasonable and necessary to finance Seabrook. Fifth, upon information and belief, the General Court of Massachusetts approved special appropriations to finance a "Seabrook Strike Force" in the Office of the Massachusetts Attorney General in order to develop and implement a litigation strategy designed to defeat Seabrook's application for an operating license. Sixth, the Civil Defense Agency, which refused to promulgate the Commonwealth's emergency response plan, operates under legislative authority delegated by the General Court of Massachusetts. Accordingly, sufficient legislative conduct has been alleged to support a claim for relief under the federal Contract Clause. Moreover, additional legislative involvement may well be uncovered and/or substantiated once reasonable discovery is permitted to take place.